Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AMERICAN HOME ASSURANCE COMPANY,
Petitioner,

v.

UMG RECORDINGS, INC. and UNIVERSAL MUSIC GROUP, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Susan Koehler Sullivan
Douglas J. Collodel
Michael M. Walsh
SEDGWICK, DETERT,
MORAN & ARNOLD LLP
801 South Figueroa St., 19th Fl.
Los Angeles, CA 90017-5556
(213) 426-6900

G. Eric Brunstad, Jr.
Counsel of Record
Collin O'Connor Udell
Matthew J. Delude
DECHERT LLP
90 State House Square
Hartford, CT 06103
(860) 524-3999
eric.brunstad@dechert.com

Counsel for Petitioner

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

Dated: September 27, 2010

Lawrence Klein
Scott Greenspan
SEDGWICK, DETERT,
MORAN & ARNOLD LLP
125 Broad St., 39th Fl.
New York, NY 10004-2400
(212) 898-4054

QUESTION PRESENTED

Arbitration agreements commonly provide for the arbitration of disputes "arising out of" a particular contractual arrangement. For over twenty years, the courts of appeals have divided sharply over the proper meaning of the phrase "arising out of." Most courts of appeals construe the phrase broadly to promote arbitration. The Ninth Circuit, however, construes it narrowly, as it did in this case, denying arbitration where other courts of appeals would require it. The question presented is:

Should the Court grant certiorari to resolve an entrenched, acknowledged, and long-standing conflict among the courts of appeals over the proper construction of the phrase "arising out of" used commonly in arbitration clauses to define the scope of the parties' arbitration agreement?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 14(b), Petitioner American Home Assurance Company is a direct, wholly owned subsidiary of Chartis U.S., Inc., which is a direct, wholly owned subsidiary of Chartis Inc., which is a direct, wholly owned subsidiary of AIUH LLC, which is a direct, wholly owned subsidiary of American International Group, Inc., which is a publicly held corporation. With the exception of the AIG Credit Facility Trust, a trust established for the sole benefit of the United States Treasury, no parent entity or publicly held entity owns 10% or more of the stock of American International Group, Inc.

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JURISDICTION

Respondents UMG Recordings, Inc. and Universal Music Group, Inc. (collectively "UMG")[1] are Delaware corporations with principal places of business in Los Angeles County, California. American Home Assurance Company ("American Home") is a New York corporation with its principal place of business in New York, New York. UMG commenced the underlying litigation in state court, and American Home invoked removal jurisdiction under 28 U.S.C. § 1441(d). The district court possessed diversity jurisdiction over the removed litigation pursuant to 28 U.S.C. § 1332. The district court denied American Home's motion to stay the litigation pending arbitration on November 3, 2008. Pet. App. 5a.

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[1] Both UMG entities are subsidiaries of non-party Vivendi S.A. ("Vivendi").

The Ninth Circuit possessed jurisdiction over American Home's appeal pursuant to 9 U.S.C. § 16. *See Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1900 (2009) (citing 9 U.S.C. § 16(a)(1)(A)). The court of appeals entered its judgment on May 13, 2010. Pet. App. 1a. American Home's petition for rehearing was denied on June 29, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The provisions of 9 U.S.C. §§ 2, 3, 4 are reprinted at Pet. App. 27a-29a pursuant to Supreme Court Rule 14(f).

PRELIMINARY STATEMENT

American Home is an insurer. UMG sued American Home in the underlying litigation, claiming that American Home breached various obligations to UMG under certain policies of insurance (the "Policies"). During the course of the litigation, American Home argued that UMG could not state a claim for damages because, under a series of documents related to the Policies (the "Payment Agreements"), UMG is obligated to reimburse American Home for any damages American Home might have to pay. UMG disputed its reimbursement obligation under the Payment Agreements, and American Home

claims that this discrete reimbursement dispute is subject to arbitration.

The Payment Agreements set forth UMG's reimbursement obligation. Pet. App. 18a-21a. Specifically, the Payment Agreements provide that "the amounts that [UMG] must pay [American Home] ... include ... Deductible Loss Reimbursements," which the agreements define as UMG's share of any losses that American Home incurs in processing and defending claims under the policies (provided those losses are within certain applicable limits, as in this case). Pet. App. 19a-20a; *see also infra* note 4. The Payment Agreements also contain an arbitration clause (the "Arbitration Clause"), covering any dispute "arising out of" the Payment Agreements. Pet. App. 22a-25a.

Applying a narrow interpretation of the phrase "arising out of," the court below concluded that the dispute over UMG's reimbursement obligation is not arbitrable. The court began by observing that the "underlying dispute" in the litigation involves UMG's claim for breach of the Policies. Pet. App. 3a. Citing its own precedent construing the phrase "arising out of" restrictively, the court then reasoned that the discrete dispute over UMG's reimbursement obligation set forth in the Payment Agreements does not "arise out of" the agreements because UMG contests its reimbursement obligation in

the context of the underlying litigation over the Policies and asserts that American Home breached the Policies as a defense. Pet. App. 3a (citing *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983)). In other words, the court below held that, even where a contract (here the Payment Agreements) sets forth a party's obligation (here UMG's reimbursement obligation) and contains an arbitration clause regarding disputes involving that obligation, a dispute does not "arise out of" that particular contract if resolution of the dispute involves consideration of more than just the contract itself – here, whether American Home breached the Policies, which UMG asserts as a defense to its reimbursement duty.

The Ninth Circuit's narrow interpretation of the meaning of the phrase "arising out of" conflicts irreconcilably with the decisions of at least four other courts of appeals. Other courts of appeals apply a much more generous interpretation and have specifically rejected the Ninth Circuit's approach. *E.g., Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 577-78 (6th Cir. 2003); *Battaglia v. McKendry*, 233 F.3d 720, 723-27 (3d Cir. 2000); *Gregory v. Electro-Mech. Corp.*, 83 F.3d 382, 385-86 (11th Cir. 1996); *Sweet Dreams Unlimited, Inc. v. Dial-a-Mattress Int'l, Ltd.*, 1 F.3d 639, 641 (7th Cir. 1993); *see also ACE Capital Re Overseas Ltd. v. Central United Life Ins. Co.*, 307 F.3d 24,

43-33 (2d Cir. 2002) (Sotomayor, J.). Indeed, under the approach that these other courts of appeals have taken, American Home's request for arbitration of the reimbursement dispute would have been granted. The issue is one of vital importance, and certiorari is warranted here to resolve this longstanding conflict among the courts of appeals.

STATEMENT

Prior to January 1, 2001, UMG and its corporate parent, Vivendi, sought to obtain commercial general liability, automobile, and workers' compensation insurance. Because of the size, complexity, and cost of this insurance, as well as the particular needs of Vivendi and UMG, the terms of the insurance that they ultimately purchased were carefully negotiated, structured, and tailored to suit Vivendi and UMG's unique requirements. The carefully structured insurance program ("Insurance Program") at issue here is the result of the parties' negotiation.[2]

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[2] UMG acknowledged in the district court that it is a named insured under the Insurance Program. ER-531. UMG agreed to the initial Payment Agreement and Schedule on May 4, 2001. ER-572, 591. The term "You" is defined in the Payment Agreements as not only Vivendi, but "each of its subsidiary, affiliated or associated organizations that are included as Named Insureds

A. The Insurance Program

Unlike a traditional consumer insurance policy, the Insurance Program does not involve the simple issuance of a single policy document. Rather, it consists of a series of interrelated documents that serve different functions. The master documents are the Payment Agreements, the first of which was entered into in 2001 and the second in 2004. ER-563, 572, 638, 648.[3] Each Payment Agreement establishes the general structure of the Insurance Program, cross-references and incorporates other relevant program documents, and defines and explains the basic rights and obligations of the parties. Pet. App. 18a-21a. Each Payment Agreement explains that UMG is obligated to pay American Home the costs of the Insurance Program, which is defined as "Your Payment Obligation." Pet. App. 20a-21a.

UMG's Payment Obligation is not limited to paying an up-front "premium." Like other

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under any of the *Policies*" and further provides that "[e]ach is jointly and severally liable to [American Home] for the entire amount of *Your Payment Obligation*." Pet. App. 20a. The phrase "Your Payment Obligation" includes the reimbursement obligation at issue in this case. Pet. App. 20a-21a.

[3] The term "ER" refers to certain "excerpts of record" filed in the Ninth Circuit.

policies of this type, UMG also has certain deductible reimbursement obligations that it must meet. ER-024, 026-27, 067, 168, 307, 532. Unlike a traditional consumer insurance policy (where the insured consumer pays a premium up-front and then bears the full amount of any loss until any applicable deductible limit is reached), the Insurance Program provides that American Home will advance payment for losses incurred and then seek reimbursement from UMG of certain amounts in accordance with the terms of the Payment Agreements.

Specifically, UMG's Payment Obligation is defined to include not only its liability for premiums, but also its share of American Home's losses and expenses in handling claims (*i.e.*, UMG's deductible reimbursement obligation). Pet. App. 20a-21a. To that end, the Payment Agreements define UMG's Payment Obligation as "the amounts that [UMG] must pay [American Home] for the insurance and services in accordance with the terms of the *Policies*, this Agreement, and [certain other policies]"; moreover, "[s]uch amounts shall include . . . premiums and premium surcharges [and] Deductible Loss Reimbursements." Pet. App. 20a. The Payment Agreements define UMG's "Deductible Loss Reimbursement" obligation as UMG's share of any losses incurred by American Home in processing and defending claims under the poli-

cies (provided those losses are within applicable deductible limits, as in this case).[4]

The Payment Agreements also contain the Arbitration Clause at issue in this matter. Pet. App. 22a-25a. This clause provides broadly that if UMG disputes any of its payment obligations to American Home under any Payment Agreement, including any deductible reimbursement obligation, UMG must identify and explain the contested items. Pet. App. 22a. If the matter remains unresolved between the parties after sixty days, the dispute must then "be submitted to arbitration." Pet. App. 22a. Further, each

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[4] The term "Deductible Loss Reimbursement" is defined specifically as "the portion of any *Loss* and *ALAE* [American Home] pay[s] that [UMG] must reimburse [American Home] under any 'Deductible' or 'Loss Reimbursement' provisions of a *Policy*." Pet. App. 19a. The term "Loss" is defined as "damages, benefits or indemnity that [American Home] become[s] obligated under the terms of the *Policies* to pay to claimants." Pet. App. 19a. The term "ALAE" is defined as "Allocated Loss Adjustment Expense as defined in the *Policies*." Pet. App. 19a. That term is defined in the LRRPs (*see infra*, note 5) attached to the policies to include all costs and fees, including attorneys' fees, incurred in the "defense of a loss or a claim or suit against [UMG]." Pet. App. 27a. In the proceedings in the district court, UMG admitted that it is responsible for any reimbursement obligations it owes to American Home under the Insurance Program; it simply contests the applicability of the reimbursement obligation to its claims. ER-495-97

Payment Agreement provides expansively that "[a]ny other unresolved dispute *arising out of* this Agreement must be submitted to arbitration." Pet. App. 23a (emphasis added).

In addition to the Payment Agreements (which as noted function as the master documents in the Insurance Program), the Insurance Program also includes the Schedules attached to each Payment Agreement. These Schedules list the relevant commercial general liability, automobile, and workers' compensation policies issued to Vivendi and UMG.[5] Finally, the Insurance Program also includes the Policies themselves.[6]

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[5] The Insurance Program further includes certain Loss Risk Rating Plan endorsements ("LRRPs"), a third category of documents appended to the policies listed on the Schedules.

[6] The relevant Policies at issue are the four commercial general liability policies identified in the 2001-2004 Schedules – these are the policies UMG claims American Home breached. The LRRP attached to each policy (*see supra*, note 5) sets forth the relevant deductible limits for each policy. The LRRPs attached to the 2001 and 2002 policies establish a deductible of $500,000 per occurrence for each of those policy years. ER-067, 168. The LRRP attached to the 2003 policy sets a deductible of $1,000,000 for policy year 2003, ER-307, and the LRRP attached to the 2004 policy sets a deductible of $250,000 for policy year 2004. ER-024, 026-27. UMG acknowledged these deductible limits in the proceedings below. ER-532.

In accordance with the applicable deductible limits of the Insurance Program, if American Home must pay a judgment or settlement on a covered claim that is less than the relevant limit, UMG would be responsible for reimbursing the payment as part of UMG's deductible reimbursement obligation. For example, if the $1 million deductible limit under the 2003 policy applied, and the amount of the judgment or settlement that American Home paid was $800,000, UMG would be responsible for reimbursing American Home that amount.[7]

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[7] *See supra*, note 6. American Home's payment of defense costs works in a similar way. ER-014. For example, if the same $1 million deductible applied, and the judgment or settlement was again for $800,000, UMG would be responsible for paying all of the defense costs because the amount of the judgment or settlement was less than the deductible amount, and UMG would be responsible for all costs associated with the judgment or settlement. ER-014. On the other hand, if American Home's payment exceeded the deductible limit, UMG and American Home would be responsible for sharing responsibility for the defense costs on a pro rata basis. ER-014. For example, if the $1 million deductible applied, and the judgment or settlement was for $2 million, and, further, the defense costs were $500,000, then UMG would be responsible for one half of the defense costs ($250,000), and American Home would be responsible for the other half. ER-014-15

B. The National Litigation

In April of 2005, a group of plaintiffs commenced the National Litigation against UMG in state court. Pet. App. 10a. Through a series of amended complaints, the plaintiffs alleged a broad assortment of claims against UMG, including racketeering, collusion, extortion, fraud, breach of contract, defamation, and libel. *See National Music Marketing, Inc. v. Universal Music Group, Inc.*, LASC Case No. SC085231. Of all these numerous allegations, American Home contends that only the defamation and libel claims were conceivably covered under American Home's Policies. Pet. App. 10a.

UMG tendered the National Litigation complaint to American Home on or about May 24, 2005. Pet. App. 10a. Following roughly two years of apparent miscommunications and contested factual circumstances, American Home contends that UMG settled the case for $360,000 without American Home's knowledge or consent. Am. Home Assur. Co.'s Reply to UMG Recordings, Inc. and Universal Music Group, Inc.'s Statement of Genuine Issues of Material Fact, at 25 (July 14, 2008). On April 3, 2008, UMG forwarded a copy of the settlement agreement to American Home after UMG had already consummated the settlement and approximately one year after UMG sued American Home. *Id.* at 26.

American Home contends that the settlement amount is less than the deductible limits of the Policies.[8] Accordingly, American Home maintains that UMG is fully responsible under its deductible reimbursement obligation for 100 percent of the settlement and 100 percent of the associated defense costs.[9]

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[8] As noted (*see supra* notes 6 & 7), the respective deductibles for the four policies at issue are $500,000 for the 2001 policy; $500,000 for the 2002 policy; $1 million for the 2003 policy; and $250,000 for the 2004 policy. The $360,000 settlement did not exceed the deductible limits for 2001, 2002, and 2003. In addition, UMG has not contended that more than $250,000 of the $360,000 settlement is attributable to the 2004 policy

[9] Among other things, American Home also contends that the settlement agreement does not allocate the $360,000 among either (1) the various defendants (one of whom was not an insured under any of American Home's Policies and therefore not covered); (2) the various claims asserted against UMG in the National Litigation (only two of which – defamation and trade libel – were conceivably covered under the policies); or (3) the various years of coverage. *Id.* at 27-30. American Home further contends that, although it asked UMG for more information on these issues so it could determine what portion of the settlement (if any) is actually covered under the policies as a settlement by an insured of a covered claim, UMG failed to provide this information. *Id.* at 30.

C. The Course of the Proceedings Below

On April 13, 2007, UMG sued American Home in state court, alleging bad faith and breach of its duty to defend UMG in the National Litigation. American Home removed the action to the district court. American Home filed its answer in December of 2007, denying UMG's allegations and also seeking reformation to correct certain errors in the 2003 and 2004 policies (which reformation the district court granted, Pet. App. 15a). Additionally, American Home raised its right to reimbursement as a defense to UMG's claims.

On May 30, 2008, American Home moved for summary judgment in the case, arguing, *inter alia*, that UMG cannot state a claim for damages because UMG is responsible under the Payment Agreements for reimbursing American Home in full for any and all amounts American Home is obligated to pay UMG in defense and settlement costs. Specifically, American Home explained: "[u]nder the policies, American Home's contractual obligation is only to 'front' these amounts – they must be reimbursed back to American Home under the terms of the Policies." SER-057.[10]

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[10] The term "SER" refers to certain "Supplemental Excerpts of Record" filed in the Ninth Circuit.

On June 23, 2008, UMG filed its opposition to American Home's motion for summary judgment. For the first time, UMG disputed that it had any obligation to reimburse American Home for the amount of the settlement or defense costs. ER-542-43. Specifically, UMG argued that "it is Vivendi, not UMG, that would have any such duty." ER-542. As noted above, however, UMG bears the same reimbursement obligations under the Payment Agreements as Vivendi. *See supra*, note 2. In addition, UMG argued that "American's breaches have relieved UMG of its duties," including its deductible reimbursement obligation. ER-543.

As noted, American Home contends that any dispute regarding UMG's reimbursement obligation is subject to the Arbitration Clause in the Payment Agreements. Pet. App. 16a. Accordingly, on July 11, 2008, American Home served an arbitration demand on UMG with respect to this dispute. ER-671, 674. In light of American Home's position that an arbitrable dispute existed, on July 14, 2008, American Home further filed a motion to stay the litigation in the district court pending resolution of the arbitration dispute.

In the litigation in the district court, American Home did not contend that UMG's claims that American Home acted in bad faith

and breached its duty to defend are subject to arbitration. American Home argued only that the discrete dispute over UMG's reimbursement obligation is subject to arbitration. It does not matter that some disputes in a particular case are subject to arbitration while others are not. As this Court has held, even though a particular controversy as a whole may not be subject to arbitration, there may be discrete issues arising in a controversy (here, whether UMG has a reimbursement obligation under the Payment Agreements) that are subject to arbitration, and those discrete issues must be submitted to arbitration even if the entire controversy cannot be. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220-21 (1985).

In a brief discussion at the end of its order denying summary judgment in the litigation, the district court denied American Home's motion for a stay of the proceeding pending arbitration. Pet. App. 15a-16a. In so doing, the district court characterized the Payment Agreements as largely concerning "the mode and manner of carrying out UMG's payment obligations under the Policies and the consequences for failing to satisfy those obligations." Pet. App. 16a. The court then concluded that "[t]he mandatory arbitration provision therefore does not extend to disputes, such as the one in the present case, concerning the validity or applicability of ALAE reimbursement obligations." Pet. App. 16a.

American Home appealed the district court's ruling to the Ninth Circuit, arguing once again that the discrete dispute over UMG's reimbursement obligation set forth in the Payment Agreements is subject to mandatory arbitration. American Home also argued that the district court erred in even reaching the question of arbitrability, given that the Arbitration Clause provides expressly that the question of the arbitrability of the dispute was itself for the arbitrators to decide. Pet. App. 25a (stating that the arbitrators "will have exclusive jurisdiction over the entire matter in dispute, including any question as to its arbitrability"). On appeal, the Ninth Circuit affirmed, holding that the district court "properly reached the question of arbitrability" and that the dispute does not "arise out of" the Payment Agreements and, thus, is not arbitrable. Pet. App. 3a. The Ninth Circuit denied American Home's petition for *en banc* rehearing on June 29, 2010, and this petition followed.[11]

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[11] American Home seeks review in this Court only of the Ninth Circuit's ruling that the discrete dispute over UMG's reimbursement obligation under the Payment Agreements does not "arise out of" the Payment Agreements.

REASONS FOR GRANTING THE WRIT

The courts of appeals are intractably divided over the proper construction of the phrase "arising out of" commonly used in arbitration clauses. The Ninth Circuit interprets the phrase restrictively to include only disputes "relating to the interpretation and performance of the contract itself." *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983); *see also Tracer Research Corp. v. Nat'l Envtl. Servs. Co.*, 42 F.3d 1292, 1295 (9th Cir. 1994). Citing *Mediterranean*, the court below applied its restrictive approach here, concluding that the dispute over UMG's reimbursement obligation does not "arise out of" the Payment Agreements because the underlying litigation involves the Policies, and UMG argues that it is excused from its reimbursement obligation because of American Home's alleged breach – thus requiring consideration of more than just the "interpretation and performance" of the Payment Agreements.

Other courts of appeals – specifically the Third, Sixth, Seventh, Eleventh, and, most importantly here, the Second – have expressly rejected the Ninth Circuit's narrow approach and construe the phrase "arising out of" broadly to include a variety of claims involving far more than merely the interpretation or performance of the contract at issue, including related tort

claims. Under the approach taken by other courts of appeals, the outcome in this case would be entirely different.

The Ninth Circuit traces its narrow approach to the Second Circuit's 1961 decision in *In re Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir. 1961). In the ensuing decades, however, the Second Circuit itself has repudiated *Kinoshita* and limited the decision to its facts. Other courts of appeals have followed suit, expressly rejecting both *Kinoshita* and the Ninth Circuit's adherence to it. Only the Ninth Circuit continues to follow *Kinoshita*.

The resulting conflict among the courts of appeals is acknowledged, longstanding, entrenched, and unlikely to resolve itself absent intervention by this Court. In a series of cases spanning nearly thirty years, the Ninth Circuit has steadfastly adhered to its position, in spite of the criticism of other courts of appeals. Further, the decision of the court below is wrong – among other things, it conflicts with prior precedents of this Court directing a generous reading of arbitration agreements. The issue is likewise an important one, as the phrase "arising out of" is used commonly in innumerable arbitration agreements and should not be subject to varying interpretation based on the circuit in which the question of its meaning is being adjudicated. In addition, this case presents an ideal vehicle to

resolve the conflict among the courts of appeals because the issue is presented squarely and is outcome-determinative. Accordingly, certiorari should be granted.

A. The Ninth Circuit's Narrow Construction of the Phrase "Arising Out of" Deepens an Intractable and Longstanding Circuit Split and Conflicts with this Court's Precedents.

The Ninth Circuit's decision in this case deepens an existing and longstanding conflict among the courts of appeals over the proper construction of the phrase "arising out of" used commonly in arbitration agreements. In this case, UMG's contested reimbursement obligation is set forth in the Payment Agreements, Pet. App. 18a-21a, and the Payment Agreements provide that any dispute "*arising out of* this Agreement" must be submitted to binding arbitration. Pet. App. 23a (emphasis added).

As noted, the Court below held that the dispute over UMG's reimbursement obligation does not "arise out of" the Payment Agreements because the underlying litigation involves UMG's claim that American Home breached the Policies, and UMG contests its reimbursement obligation on the theory that American Home's breach excuses its performance. Accordingly, consideration of the reimbursement dispute

would require more than simply the mere "interpretation" of the Payment Agreements – it would also require consideration of UMG's allegations concerning American Home's alleged breach. Citing its own prior precedent construing the phrase "arising out of" narrowly, the court remarked: "UMG's contention that it might not be obligated to perform in full its duties under the policies if American Home acted in bad faith does not transform those claims into disputes 'arising out of' the payment agreements." Pet. App. 3a (citing *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983)).

The Ninth Circuit stands alone in its narrow construction of the phrase "arising out of," which it has held covers only disputes "relating to the interpretation and performance of the contract itself." *Mediterranean*, 708 F.2d at 1464; *see also Tracer*, 42 F.3d at 1295. The Ninth Circuit has persisted in its restrictive construction of the phrase, *see, e.g., Tracer*, 42 F.3d at 1295, in spite of the fact that other courts of appeals have adopted a far more generous view and have expressly criticized and rejected the Ninth Circuit's approach.

The Ninth Circuit's restrictive approach follows the Second Circuit's early decision in *In re Kinoshita & Co.*, 287 F.2d 951, 953 (2d Cir. 1961). *See Tracer*, 42 F.3d at 1295; *Mediterra-*

nean, 708 F.2d at 1464 (citing *Kinoshita*, 287 F.2d at 953) ("Judge Medina [in *Kinoshita*] concluded that when an arbitration clause 'refers to disputes or controversies under or arising out of the contract,' arbitration is restricted to 'disputes and controversies relating to the interpretation of the contract and matters of performance.'").

Notably, however, the Second Circuit itself has repudiated the reasoning of *Kinoshita* and has limited the decision to its facts. *E.g., ACE Capital Re Overseas Ltd. v. Central United Life Ins. Co.*, 307 F.3d 24, 32-33 (2d Cir. 2002) (Sotomayor, J.) ("*Kinoshita*, which was adopted before the Supreme Court's more recent decisions emphasizing the strong federal policy in favor of arbitration, has frequently been criticized in this Circuit, and no decision of recent vintage mentions the case without confining it to its precise facts."); *Louis Dreyfus Negoce v. Blystad Shipping & Trading, Inc.*, 252 F.3d 218, 225 (2d Cir. 2001) ("We have . . . since limited [*Kinoshita*'s] holding to its facts, declaring that absent further limitation, only the precise language in *Kinoshita* . . . would evince a narrow clause"); *S.A. Mineracao da Trindade-Samitri*, 745 F.2d 190, 194 (2d Cir. 1984) ("We decline to overrule *In re Kinoshita*, despite its inconsistency with federal policy favoring arbitration, particularly in international business disputes, because we are concerned that contracting parties may have (in theory at least) relied on that case in their for-

mulation of an arbitration provision. We see no reason, however, why we may not confine *Kinoshita* to its precise facts."); *St. Paul Fire & Marine Ins. Co. v. Employers Reinsurance Corp.*, 919 F. Supp. 133, 135 (S.D.N.Y. 1996) (noting that in *S.A. Mineracao* and *Genesco*, "the court grappled with *Kinoshita* and left it in tatters. While declining to overrule the case outright, the court confined *Kinoshita* to 'its precise facts' and noted that it was inconsistent with the federal policy favoring arbitration. As a result [of later Second Circuit cases], the authority of *Kinoshita* is highly questionable in this Circuit.") (citations omitted); *cf. Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 854 n.6 (2d Cir. 1987) ("we recognize . . . that *Kinoshita* is inconsistent with the federal policy favoring arbitration, nevertheless we decline the invitation [to overrule *Kinoshita*]. Because the instant clause is distinguishable from the *Kinoshita* clause, we need not discuss the continued viability of *Kinoshita*.") (citations omitted).

Likewise, other circuits have sharply criticized *Kinoshita* as being out of step with this Court's more recent precedents, particularly the Court's indications that arbitration agreements are favored and that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *E.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *see also* Mark Berger, *Arbitration and*

Arbitrability: Toward an Expectation Model, 56 BAYLOR L. REV. 753, 772 (2004) ("The development of the presumption of arbitrability in cases after *Kinoshita* . . . led the Second Circuit to restrict the decision to its facts, while courts in other circuits have declined to follow the ruling's narrow approach."). This criticism is longstanding, commencing in 1985 with the Fifth Circuit holding that a district court had erred in relying on *Kinoshita* because, *inter alia*, "*Kinoshita* is inconsistent with federal policy favoring arbitration." *Mar-Len of Louisiana, Inc. v. Parsons-Gilbane*, 773 F.2d 633, 637 (5th Cir. 1985). Since then, the criticism has grown and spread.

In *Sweet Dreams Unlimited, Inc. v. Dial-a-Mattress Int'l, Ltd.*, the Seventh Circuit construed the phrase "arising out of" appearing in an arbitration clause in the context of a rescission action seeking to undo the parties' contract. *See Sweet Dreams*, 1 F.3d 639, 641 (7th Cir. 1993). The Seventh Circuit noted that in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), this Court held that the parties' similar "contractual language [was] easily broad enough to encompass Prima Paint's claim that both execution and acceleration of the . . . agreement were procured by fraud." 1 F.3d at 641 (quoting *Prima Paint*, 388 U.S. at 406) (internal quotation marks omitted). After discussing the arbitration clause at issue in *Prima Paint*, which provided that "[a]ny controversy or

claim *arising out of or relating to* this Agreement, or the breach thereof, shall be settled by arbitration . . . ," the Seventh Circuit reversed the district court's holding that "because the phrase 'relating to' appears in *Prima Paint* but not in the [*Sweet Dreams*] Agreement, the [*Sweet Dreams*] arbitration provision . . . is narrower than that at issue in *Prima Paint*." 1 F.3d at 642.

The Seventh Circuit observed that, in reaching its conclusion, the district court had "relied principally upon *Mediterranean*[], which in turn relied upon *In re Kinoshita*[] . . . ," and also noted that both *Mediterranean* and *Kinoshita* construed "arise under" clauses as encompassing "only those disputes that relate to the interpretation and performance of the contract itself." *Id.*[12] Deliberately departing from *Kinoshita*, the Seventh Circuit interpreted the phrase "arising out of" as "reach[ing] all disputes having their origin or genesis in the contract, *whether or*

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[12] The Seventh Circuit noted that the Ninth Circuit in *Mediterranean* interpreted the phrase "arising hereunder" as synonymous with "arising under," so that for purposes of its analysis, the arbitration provisions in *Mediterranean* ("arising hereunder") and *Kinoshita* ("arising under") were identical. *Sweet Dreams*, 1 F.3d at 624 n.5 (citing *Mediterranean*, 708 F.2d at 1464). As discussed *infra*, the Ninth Circuit later equated the phrase "arising under" with "arising out of." *Tracer*, 42 F.3d at 1295.

not they implicate interpretation or performance of the contract per se." *Id.* (emphasis added).

In reaching its conclusion, the Seventh Circuit explicitly declined to follow "Judge Medina's dicta in *Kinoshita* that suggests an equation between 'arising under' and 'arising out of,'" stating that "our own analysis rejects such an equation." *Id.* Citing *Moses Cone* and the principle that "any doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration," 460 U.S. at 24-25, the Seventh Circuit concluded that the rescission claim was subject to arbitration. 1 F.3d at 642-43.

One year later, the Ninth Circuit reached precisely the opposite result, holding that the "'arising out of' language" in an arbitration clause "is of the same limited scope as the 'arising under' language in *Mediterranean Enterprises*. *See id.* (quoting *In re Kinoshita & Co.*), 287 F.2d 951, 953 (2d Cir. 1961))." *Tracer*, 42 F.3d at 1295. Thus, according to the Ninth Circuit, the phrases "arising out of" and "arising under" are both strictly restricted to matters involving the interpretation or performance of a contract. In contrast, the Seventh Circuit distinguishes the two phrases, concluding that "arising out of" is broader, and includes all disputes involving the contract, not simply those pertaining to enforcement or construction of the agreement itself.

Like the Seventh Circuit, the Eleventh Circuit has also vigorously rejected the Ninth Circuit's adherence to *Kinoshita*. *See H.S. Gregory v. Electro-Mech. Corp.*, 83 F.3d 382, 385-86 (11th Cir. 1996). Construing the phrase "any dispute between any of the Parties *which may arise hereunder,*" the Eleventh Circuit concluded that various tort claims (fraud, fraudulent inducement, deceit, misrepresentation, conversion, breach of good faith and fair dealing, and outrage) fell within the scope of the relevant arbitration clause at issue. *Id.* at 384, 386. The Eleventh Circuit noted that the plaintiffs in the case had relied on *Kinoshita* in drafting their agreement, but that "as early as 1967, the Supreme Court held that a claim of fraud that related to inducement of an agreement is covered by an 'arising out of or relating to the agreement' arbitration clause." *Id.* at 385 (citing *Prima Paint*, 388 U.S. 395 (1967)). Moreover, the Eleventh Circuit observed that in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), this Court "required no such additional language to require arbitration of the kind of claims asserted" in *Gregory*. 83 F.3d at 385 (stating that *Scherk* held that arbitration of fraudulent misrepresentation claim was required because the claim 'arose out of' the contract). The Eleventh Circuit added:

> To the extent that the cases binding on this Circuit may have left *Kinoshita* intact, we now reject it simply as not being in accord with present day notions of arbitration as a viable alternative dispute resolution procedure. The Second Circuit itself later recognized that the *Kinoshita* decision was inconsistent with federal policy favoring arbitration but, although obviously aware of the incorrectness of the decision, refused to overrule the case only because lawyers in that circuit may have "relied on the case in their formulation of an arbitration provision." Only the Ninth Circuit seems to have followed the decision in *Kinoshita*. Both the Seventh and the Fifth Circuits have more willingly followed the admonition of the Supreme Court that "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."

83 F.3d at 385 (citations omitted). The Eleventh Circuit then departed from the Seventh Circuit in *Sweet Dreams* by adding that it had not drawn a distinction between the words "arising under" and "arising out of," and that in *Scherk*, 417 U.S. at 506, this Court "seemed to use 'arise out of' and 'arise under' interchangeably." *Gregory*, 83 F.3d at 386. In other words, although the Seventh Circuit may construe the phrases "arising

out of" and "arising under" differently, the Eleventh Circuit declined to do so. In any event, the Eleventh Circuit clearly construes both "arising out of" and "arising under" more broadly than the Ninth, and has specifically rejected the Ninth Circuit's narrow approach.

In *Battaglia v. McKendry*, the Third Circuit construed the phrase "arises hereunder" to encompass disputes relating to the formation of a settlement agreement, and specifically that the scope of the clause was not limited to disputes involving merely the interpretation and performance of the agreement. 233 F.3d 720, 723-27 (3d Cir. 2000). The Third Circuit rebuffed the plaintiff's reliance on *Kinoshita* and other decisions adopting its reasoning, noting that "this line of cases has been discredited both in the Second Circuit and in other jurisdictions." *Id.* at 725. The Third Circuit continued, "[i]n particular, we decline to follow the Ninth Circuit, which apparently continues to approve the teaching of *Kinoshita*." *Id.* at 727 (citing *Tracer*, 42 F.3d at 1295; *Mediterranean*, 708 F.2d at 1464). Instead, the Third Circuit followed the Eleventh Circuit's decision in *Gregory*, concluding that "when phrases such as 'arising under' and 'arising out of' appear in arbitration provisions, they are normally given broad construction, and are generally construed to encompass claims going to the formation of the underlying agreement." *Battaglia*, 233 F.3d at 727.

In *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, the Sixth Circuit likewise declined to follow *Kinoshita* when construing the phrase "arising out of" in an arbitration clause. 350 F.3d 568, 577-78 (6th Cir. 2003). After discussing the Second Circuit's negative treatment of *Kinoshita* as well as the Seventh Circuit's decision in *Sweet Dreams*, the Sixth Circuit held that a fraudulent inducement claim fell within the ambit of the arbitration clause at issue. *Id.* ("an arbitration clause requiring arbitration of any dispute arising out of an agreement is 'extremely broad.'") (citation omitted).

It is evident that, under the more generous approach that the Third, Sixth, Seventh, Eleventh (and, in more recent years, Second) Circuits have taken, arbitration of the discrete dispute over UMG's reimbursement obligation would be required as "arising out of" the Payment Agreements. The Payment Agreements specify UMG's obligation, and any dispute over it necessary involves the Payment Agreements directly. Although consideration of UMG's asserted defense to its reimbursement obligation (*e.g.*, whether American Home breached the Policies) requires more than just analysis of the interpretation or performance of the Payment Agreements themselves, that is not materially different from the additional analysis required in *Gregory*,

Battaglia, *Sweet Dreams*, or *Highlands* to resolve the relevant tort and breach of contract claims at issue in those matters. If a dispute involving a "conversion" or "fraud" claim properly "arises out of" a contract, then so does UMG's dispute over its contractual reimbursement obligation. The only reason for the difference in outcome here is the far more restrictive nature of the Ninth Circuit's approach in interpreting the phrase "arising out of."

As the foregoing illustrates, the conflict among the courts of appeals on the proper construction of the phrase "arising out of" is long-standing, developed, and entrenched, justifying this Court's intervention. It is likewise outcome-determinative in this case. In addition, for the reasons offered by the various courts of appeals that have rejected *Kinoshita*, the Ninth Circuit's approach is simply wrong. Certiorari is warranted.

B. The Proper Construction of the Phrase "Arising Out Of" Used Commonly in Arbitration Agreements Is of Vital Importance, and this Case Presents an Ideal Vehicle to Resolve the Conflict Among the Courts of Appeals on this Question.

Parties routinely use the phrase "arising out of" to define the scope of their arbitration

agreements, and competing interpretations of this common phrase among the several courts of appeals serves only to generate unfortunate uncertainty, needless litigation, and improvident cost. Parties rely on what they believe is a correct understanding of the phrase when they draft their arbitration agreements, and that understanding should not be subject to variance depending on the location of the court interpreting their agreement. Certiorari is warranted to establish much-needed uniformity in this area.

In addition, the Ninth Circuit's standard is affirmatively harmful precisely because it is so narrow, denying arbitration where the parties intended it. Further, the Ninth Circuit's standard is subject to abuse, as this case well illustrates. When UMG disputed its reimbursement obligation, American Home sought to have the dispute submitted to arbitration in accordance with the parties' arbitration agreement. By the simple expedient of interposing issues that stray beyond the mere interpretation of the Payment Agreements (*e.g.*, by arguing that it was excused from performance of its reimbursement obligation because of American Home's alleged breach of the Policies), UMG succeeded in defeating arbitration and, in the process, effectively gutted the Arbitration Clause. The effect, of course, is to chart a path of easy evasion for similar cases in the future. This makes no sense and serves only to frustrate arbitration and the policies of

the law that seek to promote it. In addition, the question is likely to recur, and is squarely raised in this instance. Moreover, resolution of the split of authority among the courts of appeals is not likely to be resolved absent intervention by this Court. The Ninth Circuit has reaffirmed its position several times, notably in the *Tracer* decision in 1994 and again in this case, and has denied *en banc* consideration of the matter. Accordingly, certiorari is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Susan Koehler Sullivan
Douglas J. Collodel
Michael M. Walsh
SEDGWICK, DETERT,
MORAN & ARNOLD LLP
801 South Figueroa St.,
19th Fl.
Los Angeles, CA 90017
(213) 426-6900

G. Eric Brunstad, Jr.
Counsel of Record
Collin O'Connor Udell
Matthew J. Delude
DECHERT LLP
90 State House Square
Hartford, CT 06103
(860) 524-3999
eric.brunstad@dechert.com

Lawrence Klein
Scott Greenspan
SEDGWICK, DETERT,
MORAN & ARNOLD LLP
125 Broad St., 39th Fl.
New York, NY 10004-2400
(212) 898-4054

Counsel for Petitioner

Dated: September 27, 2010

APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED MAY 13, 2010

FILED

May 13 2010

MOLLY C DWYER, CLERK
U S COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UMG RECORDINGS, INC. and UNIVERSAL MUSIC GROUP, INC., Plaintiffs – Appellees, v. AMERICAN HOME ASSURANCE COMPANY, Defendant - Appellant.	No. 08-56905 D.C. No. CV-07-03257 GAF (AGRx) **MEMORANDUM***

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix A

Appeal from the United States District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Argued and Submitted March 4, 2010
Pasadena, California

Before: KOZINSKI, Chief Judge, W. FLETCHER, Circuit Judge, and TUNHEIM,** District Judge.

American Home Assurance Company ("American Home") appeals the district court's denial of its motion to stay proceedings pending arbitration. The district court concluded that the mandatory arbitration provision does not extend to the claims by UMG Recordings, Inc. and Universal Music Group, Inc. (collectively, "UMG") against American Home. We have jurisdiction pursuant to 9 U.S.C. § 16(a)(1)(A), and we affirm.

** The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

First, the district court properly reached the issue of arbitrability. The arbitration provisions in the payment agreements do not contain clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). For example, they state that arbitrators have exclusive jurisdiction to resolve questions of arbitrability, but they also state that actions concerning arbitrability must be brought in New York courts.

Second, the underlying dispute does not arise out of the payment agreements and therefore is not subject to the mandatory arbitration provisions. American Home concedes that the arbitration provisions do not extend to disputes over the policies, including the claims UMG raises in its complaint. UMG's contention that it might not be obligated to perform in full its duties under the policies if American Home acted in bad faith does not transform those claims into disputes "arising out of" the payment agreements. *See Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983); *cf. Alticor, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 411 F.3d 669, 670-72 (6th Cir. 2005).

For the foregoing reasons, we **AFFIRM** the district court's denial of American Home's motion to stay proceedings pending arbitration.

APPENDIX B – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED NOVEMBER 3, 2008

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	CV 07-3257 GAF (AGRx)
Date:	November 3, 2008
Title:	UMG Recordings, Inc. et al. v. American Home Assurance Company et al.

Present: The Honorable **GARY ALLEN FEESS**

Renee Fisher	None	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: (In Chambers)

Appendix B

ORDER RE: MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This lawsuit centers on a dispute between Plaintiffs UMG Recordings, Inc. and Universal Music Group, Inc., (collectively, "UMG"), and their insurer, Defendant American Home Assurance Co., over American Home's alleged refusal to defend and indemnify UMG in an underlying state case filed on April 15, 2005. UMG brought this action seeking reimbursement for its attorneys' fees, related costs, and the amount expended in settling the state case.

A. FACTUAL BACKGROUND

In the underlying state case, National Music Marketing, Inc. sued UMG in Los Angeles Superior Court for alleged RICO violations and a host of other misconduct, including defamation and trade libel (the "National" action).[1] UMG, through its insurance broker, Marsh USA ("Marsh"), allegedly tendered defense of the action to AIGDC ("AIG"), American Home's claims ad-

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[1] See Nat'l Music Mktg., Inc. v Universal Music Group, Inc., LASC SC 085231.

ministrator.[2] UMG asserts that it did not receive a satisfactory response to its tender and that, because American Home was unresponsive to its demands, UMG paid for its own defense and ultimately settled the National action in March 2007 for $360,000, having incurred approximately $1.3 million in legal fees and costs. UMG then filed the present lawsuit against American Home in April 2007, alleging claims for breach of contract, breach of the covenant of good faith and fair dealing, and declaratory relief.

B. AMERICAN HOME'S MOTIONS

American Home contends that the undisputed facts demonstrate that it is entitled to judgment as a matter of law, and now moves for summary judgment on all claims. American Home argues that it accepted UMG's tender of the defense of the lawsuit, and that UMG breached its obligations under the relevant insurance policies by (1) not obtaining American Home's consent to the choice of defense counsel, (2) not submitting legal bills to American Home for review and approval, and (3) not providing any information about the lawsuit. American Home thus maintains that its alleged failure to defend and indem-

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[2] Marsh and AIG are not parties to this action

nify was caused by UMG's failure to cooperate. Furthermore, American Home contends that, even if the facts regarding the tender are in dispute, UMG's total litigation costs were below the policy deductible, and UMG therefore suffered no damages as a result of American Home's failure to accept the tender.

In the alternative, American Home moves for a stay, arguing that the alleged damages in dispute in this case are encompassed within an arbitration provision in an overarching series of "Payment Agreements" between American Home and UMG's parent, Vivendi Universal, SA, and that resolution of such disputes must be arbitrated. Because, according to American Home, an arbitration under the Payment Agreements is currently under way in New York over monies allegedly owed by Vivendi to American Home thereunder, this litigation should be stayed.

II. DISCUSSION

The legal standard applicable to summary judgment motions prevents the Court from granting American Home's motion.[3]

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[3] The parties disagree whether California or New York law governs the dispute. Under California law, "the choice-of-law rule in . . . section 1646 determines the law

Appendix B

A. SUMMARY JUDGMENT LEGAL STANDARD

The Court assesses American Home's motion under the usual summary judgment standard which permits entry of judgment only where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, the Court must first decide whether there exist "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). If the facts are not in dispute, then the Court determines whether the moving party is entitled to judgment as a matter of law.

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governing the interpretation of a contract, notwithstanding the application of the governmental interest analysis to other choice-of-law issues." Frontier Oil Corp. v. RLI Ins. Co., 63 Cal Rptr. 3d 816, 835 (Ct. App. 2007). Because the present dispute involves issues of contract interpretation, the Court must invoke section 1646 to determine whether to apply California or New York law. The answer under section 1646 turns on the intended place of performance of the contract. See Cal. Civ. Code § 1646. In the case of an insurance contract, the place of performance is the location of the insured risk. Frontier Oil, 63 Cal. Rptr. 3d at 837. The location of the insured risk in this case is California; therefore, California law applies.

B. GENUINE ISSUES REGARDING UMG's TENDER AND AMERICAN HOME'S RESPONSE

On April 15, 2005, the National action was filed in Los Angeles Superior Court. The record plainly establishes that, on or about May 24, 2005, UMG tendered the defense and indemnification of the *National* action to American Home, but certainty ends at that point. American Home purportedly accepted the tender under a reservation of rights letter issued in September 2005, but UMG presents evidence that it never received the letter and that, as of October 2005, Warren Usdin, an employee of AIG, American Home's claims administrator, advised that he had not yet made a decision regarding coverage. UMG presents evidence that it received further information to that effect from AIG in February 2006. In the meantime, UMG had retained counsel and was proceeding with the defense of its lawsuit.

American Home contends that, in mid-March 2006, it sent UMG a second reservation of rights letter which acknowledged that the defamation and trade libel claims in the underlying lawsuit were covered by the relevant policies. American Home asked for information concerning the lawsuit and for identification of the attorney

hired by UMG to defend the action. The letter, however, was misdated, apparently made reference to the wrong insurance policy, and was construed by UMG's broker as a denial of coverage. Confusion reigned over the next several months as UMG and American Home, through their respective agents, sought to clarify the status of American Home's coverage position. The record suggests that the confusion was not cleared up until October 2006, and even then, UMG claims that the file had been transferred to a new adjuster who allegedly was not identified to UMG until December 2006 and who did not contact UMG until January 5, 2007.

The parties present further conflicting evidence regarding whether and to what extent UMG complied with American Home's requests for information regarding the litigation and legal costs incurred by UMG. For instance, American Home maintains that it requested information concerning the National action from UMG on at least three occasions, beginning in September 2005—information it apparently did not receive until late-November 2006. UMG rebuts that it did not supply information regarding the National action to American Home earlier because it was not apprised of American Home's coverage position until the latter half of 2006, and did not receive a list of specific materials American Home required until November 2006.

The foregoing demonstrates the existence of numerous disputed facts regarding: (1) American Home's alleged breach of its duty to defend and indemnify; and (2) UMG's obligation to cooperate with its insurer in the defense of the lawsuit. The Court is satisfied that these disputes could be resolved in favor of either party, and that a judgment in favor of either side would be sustained on appeal against a sufficiency-of-the-evidence challenge. In such circumstances, the Court cannot grant summary judgment.

C. UMG'S REIMBURSEMENT OBLIGATIONS

In its motion, American Home claims that it has placed UMG's request for reimbursement "in line for payment" (Mot. at 15:16–19), but argues that, even if it was obligated to defend and indemnify UMG, UMG has suffered no damages because the deductible and reimbursement provisions of the relevant policies will require UMG to reimburse those payments. In other words, according to American Home, even if it was obligated to "front" UMG's litigation costs in the first instance, the relevant policies require repayment of those costs in full by UMG to American Home.

The policies in question each contained deductibles for policy years 2001, 2002, 2003 and 2004. They also provide for reimbursement of

some payments under the Large Risk Rating Plan Endorsement ("LRRP"). The Deductible Coverage Endorsement ("DCE") obligated UMG to reimburse American Home for payments up to the deductible limit and certain Allocated Loss Adjustment Expenses ("ALAE") (litigation costs). However, the parties dispute: (1) which policies covered the National action; (2) the amount of the deductible under each of the policies; and (3) the amount of ALAE due under the policies. Furthermore, the parties dispute which of the LRRP provisions (Option C(i) or Option C(ii)) sets forth the proper reimbursement rate.

The evidence before the Court will not allow resolution of these questions as a matter of law. For instance, based on the evidence in the record, a reasonable trier of fact could interpret the LRRP in such a way that Option C(i) is triggered only where American Home's indemnity obligation does not exceed the relevant deductible amount. But even in that case, whether a triggering event occurred necessarily hinges on a determination as to which policy governs the dispute because of the difference in the deductibles established under different policies—a question that remains unresolved on this record. Thus, for example, even if Option C(i) were to apply, it is not clear whether American Home would be entitled to only 50% of ALAE under the 2002 policy, or 100% of ALAE under one of the other policies. Finally, how these

issues are resolved will affect at least one other issue: whether UMG may recover prejudgment interest.

Given the lack of clarity regarding these issues, the Court cannot grant American Home's motion for summary judgment.

D. BAD FAITH AND PUNITIVE DAMAGES

Because the Court cannot decide the dispute regarding the breach of contract claim, the Court cannot resolve the bad faith claim on American Home's motion. A finding of breach would give rise to a possibility that the breach was in bad faith; on the other hand, if American Home is found not to have breached the contract, the bad faith claim would be mooted.

E. REFORMATION

As part of its summary judgment motion, American Home submits that the 2003 DCE and 2004 LRRP contain scrivener's errors because the applicable deductible amounts were not specified therein. American Home seeks reformation of these documents to reflect the parties' mutually agreed-upon deductible amounts, and has attached what it claims are the corrected versions of the 2003 DCE.

American Home's request for reformation is **GRANTED** because "[a]n insurance policy may be reformed where, by reason of fraud, inequitable conduct or mutual mistake, the policy as written does not express the actual and real agreement of the parties." 2 B.E. Witkin, Summary of California Law § 216(1) (10th ed. 2005) (internal quotation marks omitted) (quoting Am. Surety Co. of New York v. Heise, 289 P.2d 103, 107 (Cal. Ct. App. 1955)). It is undisputed that the deductibles for the 2003 and 2004 Policies were $1 million and $250,000, respectively, and UMG does not contend that the omissions of the deductible amounts in the 2003 DCE and 2004 LRRP were anything other than scrivener's errors. Moreover, the fact that Vivendi is not a party to the present action does not preclude reformation because, as UMG's subsidiary, UMG's interests are directly aligned with those of Vivendi. The Court therefore finds that reformation is appropriate under these circumstances.

F. MOTION TO STAY

As noted above, American Home contends that, if it is not entitled to summary judgment, it is entitled to a stay of these proceedings because Vivendi and American Home are currently arbitrating Vivendi's reimbursement obligations under the policies and Payment Agreements in New

York. Stripped to its essence, American Home's basic premise is that the policies and Payment Agreements were correlative components of an overarching "Insurance Program," and that ***any*** dispute concerning that program governed by the mandatory arbitration provision in the Payment Agreements.

Although the Court agrees that the Payment Agreements are directly linked to UMG's reimbursement obligations, the Payment Agreements largely concern the mode and manner of carrying out UMG's payment obligations under the Policies and the consequences for failing to satisfy those obligations. The mandatory arbitration provision therefore does not extend to disputes, such as the one in the present case, concerning the validity or applicability of ALAE reimbursement obligations. Moreover, even if the present dispute were to fall within the ambit of the arbitration provision, American Home likely waived its right to seek arbitration by litigating this action for well over a year before moving for a stay. Accordingly, American Home's stay motion is **DENIED**.

III. CONCLUSION

For the reasons set forth above, American Home's summary judgment and stay motions are

DENIED. American Home's request for reformation, however, is **GRANTED**.[4]

IT IS SO ORDERED.

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[4] UMG's Rule 56(f) request is **DENIED** because UMG has failed to meet some of the requirements for a valid Rule 56(f) request, such as providing affidavits setting forth the particular facts expected from further discovery. *See California ex rel. Cal. Dep't of Toxic Substances Control v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998). Additionally, the Court has considered the parties' evidentiary objections in reaching its conclusions. To the extent that those objections are inconsistent with the Court's ruling, they are **OVERRULED**. *See Gates v. Deukmejian*, 987 F.2d 1392, 1400 (9th Cir. 1992) (citing *Truck Terminals, Inc. v. Comm'r*, 314 F.2d 449, 454 (9th Cir. 1963)).

APPENDIX C – EXCERPTS FROM 2001 PAYMENT AGREEMENT[1]

WHAT HAVE *YOU* AND *WE* AGREED TO?

***We* have agreed** to the following:

- to provide *you* insurance and services according to the *Policies* and other agreements; and
- to extend credit to *you* by deferring our demand for full payment of the entire amount of *Your Payment Obligation* if *you* make partial payments according to this Agreement.

To induce us to agree as above,

***You* have agreed** to the following:

- to pay us all *Your Payment Obligation* and to perform all *your* other obligations according to this Agreement and *Schedule* for all entities covered by the *Policies*;
- to provide us with collateral according to this Agreement and *Schedule*;

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[1] The excerpts reproduced here are reproduced from ER-565-66 and 570-71, and taken from the 2001 Payment Agreement discussed above. These excerpts are identical to the language contained in the 2004 Payment Agreement, which can be found at ER-640-41 and 646-47.

Appendix C

WHICH WORDS HAVE SPECIAL MEANINGS IN THIS AGREEMENT?

Words with special meanings in the *Policies* have the same meanings in this Agreement as they have in the *Policies*. Non-italicized capitalized words in this Agreement are defined in the *Policies*, or their meanings are otherwise described in this Agreement.

The following are definitions of other special words. Terms printed in this Agreement in italic typeface have the meanings described below.

1. **"ALAE"** means Allocated Loss Adjustment Expense as defined in the *Policies*.

2. **"Deductible Loss Reimbursements"** means the portion of any *Loss* and *ALAE* we pay that *you* must reimburse us for under any "Deductible" or "Loss Reimbursement" provisions of a *Policy*.

3. **"Loss"** or **"Losses"** means damages, benefits or indemnity that we become obligated under the terms of the *Policies* to pay to claimants.

4. **"Policy"** or **"Policies"** means:

   - any of the insurance policies described by their policy numbers in the *Sched-*

ule, and their replacements and renewals;

- any additional insurance policies that we may issue to *you* that *you* and we agree to make subject to this Agreement;

***

7. **"You"** means the person or organization named as our Client in the title page of this Agreement, its predecessor and successor organizations, and each of its subsidiary, affiliated or associated organizations that are included as Named Insureds under any of the *Policies*. Each is jointly and severally liable to us for the entire amount of *Your Payment Obligation*.

8. **"Your Payment Obligation"** means the amounts that you must pay us for the insurance and services in accordance with the terms of the *Policies*, this Agreement, and any similar primary casualty insurance policies and agreements with us incurred before the inception date hereof. Such amounts shall include, but are not limited to, any of the following, including any portions thereof not yet due and payable:

- the premiums and premium surcharges,
- *Deductible Loss Reimbursements*,

- any amount that we may have paid on *your* behalf because of any occurrence, accident, offense, claim or suit with respect to which *you* are a self-insurer,
- any other fees, charges, or obligations as shown in the *Schedule* or as may arise as *you* and we may agree from time to time.

Loss Reserves: *Your Payment Obligation* includes any portion of the premiums, premium surcharges, *Deductible Loss Reimbursements* or other obligations that we shall have calculated on the basis of our reserves for *Loss* and *ALAE*. Those reserves shall include specific reserves on known *Losses* and *ALAE*, reserves for incurred but not reported *Losses* and *ALAE*, and reserves for statistically expected development on *Losses* and *ALAE* that have been reported to us, Any *Loss* development factors we apply in determining such reserves will be based on our actuarial evaluation of relevant statistical data including, to the extent available and credible, statistical data based upon *your* cumulative *Loss* and *ALAE* history.

***

Appendix C

HOW WILL DISAGREEMENTS BE RESOLVED?

What if we disagree about payment due?
If *you* disagree with us about any amount of *Your Payment Obligation* that we have asked *you* to pay, within the time allowed for payment *you* must:

- give us written particulars about the items with which *you* disagree; and
- pay those items with which *you* do not disagree.

We will review the disputed items promptly and provide *you* with further explanations, details, or corrections. *You* must pay us the correct amounts for the disputed items within 10 days of agreement between *you* and us about their correct amounts. Any disputed items not resolved within 60 days after our response to *your* written particulars must immediately be submitted to arbitration as set forth below. With our written consent, which shall not be unreasonably withheld, you may have reasonable additional time to evaluate our response to your written particulars.
So long as you are not otherwise in default under this Agreement, we will not exercise our rights set forth under "What May We Do in Case of Default?", pending the outcome of the arbitration on the disputed amount of *Your Payment Obligation*.

Appendix C

What about disputes other than disputes about payment due?
Any other unresolved dispute arising out of this Agreement must be submitted to arbitration. *You* must notify us in writing as soon as *you* have submitted a dispute to arbitration. We must notify *you* in writing as soon as we have submitted a dispute to arbitration.

Arbitration Procedures

How arbitrators must be chosen: *You* must choose one arbitrator and we must choose another. They will choose the third. If *you* or we refuse or neglect to appoint an arbitrator within 30 days after written notice from the other party requesting it to do so, or if the two arbitrators fail to agree on a third arbitrator within 30 days of their appointment, either party may make an application to a Justice of the Supreme Court of the State of New York, County of New York and the Court will appoint the additional arbitrator or arbitrators.

Qualifications of arbitrators: Unless *you* and we agree otherwise, all arbitrators must be executive officers or former executive officers of property or casualty insurance or reinsurance companies or insurance brokerage companies, or risk management officials in an

industry similar to *yours*, domiciled in the United States of America not under the control of either party to this Agreement.

How the arbitration must proceed: The arbitrators shall determine where the arbitration shall take place. The arbitration must be governed by the United States Arbitration Act, Title 9 U.S.C. Section 1, et seq. Judgment upon the award rendered by the arbitrators may be entered by a court having jurisdiction thereof.

You and we must both submit our respective cases to the arbitrators within 30 days of the appointment of the third arbitrator. The arbitrators must make their decision within 60 days following the termination of the hearing, unless *you* and we consent to an extension. The majority decision of any two arbitrators, when filed with *you* and us will be final and binding on *you* and on us.

The arbitrators must interpret this Agreement as an honorable engagement and not merely a legal obligation. They are relieved of all judicial formalities. They may abstain from following the strict rules of law. They must make their award to effect the general purpose of this Agreement in a reasonable manner.

The arbitrators must render their decision in writing, based upon a hearing in which evi-

dence may be introduced without following strict rules of evidence, but in which cross-examination and rebuttal must be allowed.

The arbitrators may award compensatory money damages and interest thereupon. They may order *you* to provide collateral to the extent required by this Agreement. They will have exclusive jurisdiction over the entire matter in dispute, including any question as to its arbitrability. However, they will not have the power to award exemplary damages or punitive damages, however denominated, whether or not multiplied, whether imposed by law or otherwise.

Expenses of Arbitration: *You* and we must bear the expense of our respective arbitrator and must jointly and equally bear with each other the expense of the third arbitrator and of the arbitration.

This Section will apply whether that dispute arises before or after termination of this Agreement.

APPENDIX D – EXCERPT FROM 2001 LARGE RISK RATING PLAN ENDORSEMENT[1]

Section 3. Definitions

A. "*Allocated Loss Adjustment Expenses*" or "*ALAE*" will include all fees for service of process and court costs and court expenses; pre- and post-judgment interest; attorneys' fees; cost of undercover operative and detective services; costs of employing experts; costs for legal transcripts, copies of any public records, and costs of depositions and court-reported or recorded statements; costs and expenses of subrogation; and any similar fee, cost or expense reasonably chargeable to the investigation, negotiation, settlement or defense of a loss or a claim or suit against you, or to the protection and perfection of your or our subrogation rights.

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[1] The excerpt reproduced here is reproduced from ER-064, and taken from the 2001 Large Risk Rating Plan Endorsement discussed above. The excerpt is identical to the language contained in the 2002 Large Risk Rating Plan Endorsement, which can be found at ER-164 and the 2003 Large Risk Rating Plan Endorsement, which can be found at ER-304

APPENDIX E
STATUTORY APPENDIX

9 U.S.C. § 2: Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3: Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the

agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4: Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 [28 USCS §§ 1 et seq.], in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure]. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and

proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure], or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

APPENDIX F – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 29, 2010

FILED

JUN 29 2010

MOLLY C DWYER, CLERK
U.S COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UMG RECORDINGS, INC. and UNIVERSAL MUSIC GROUP, INC., Plaintiffs – Appellees, v. **AMERICAN HOME ASSURANCE COMPANY,** Defendant - Appellant.	No. 08-56905 D.C. No. 2:07-cv-03257-GAF-AGR **ORDER**

Before: **KOZINSKI**, Chief Judge, **W. FLETCHER**, Circuit Judge,

and **TUNHEIM**, District Judge.*

The petition for rehearing and rehearing en banc is denied. See Fed. R. App. P. 35, 40.

13857111 5 LITIGATION

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* The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.